UNITED STATES

by Charles L. Glenn and Charles J. Russo

Glenn, C. L. & Russo, C. J. (2012). United States. In C. L. Glenn & J. De Groof (Eds.), *Balancing freedom, autonomy and accountability in education: Volume 3* (347-379). Tilburg, NL: Wolf Legal Publishers.

Overview

The public educational system of the United States, which is loosely coupled at best, is marked by a strong tradition of local (but not necessarily school level) decisionmaking that traces its origins to seventeenth century New England. Local school officials, through their governing bodies, operate within a framework of laws and regulations enacted at the state level but often applied unevenly by local school systems in the absence of strong state administrative controls. One result is that this kind of legal structure creates lots of wiggle room for educational innovators. One can fight local battles to change the rules or move someplace else where the regulatory climate better suits one's pedagogical imagination. And since the question of just who ultimately is responsible for the education of children (parents? the state?) has never been squarely resolved in America, the country has accommodated many alternatives to public schools.[1]

'Public education' – that is, schooling provided by local school boards in the United States – is frequently criticized for a variety of real as well as imagined failings and

yet enjoys an almost mythical status as the institution which is believed to knit together this highly diverse and constantly changing society.[2]

What [Americans] have, in effect, is a normative attachment to the public schools and an affective inclination to see the public schools in a sympathetic light, whatever the latter's actual performance might be. . . . two-thirds of Americans say the public schools deserve support even when they are performing poorly. . . many private school parents share this same attachment to the public school system. . . . Forty-three percent of public parents say they wouldn't feel right putting their kids in private schools a profoundly important fact, given that so many of these same parents think that private schools are actually *better* than public schools.[3]

In the service of the integrative mission attributed to the common public school, any references to Christianity (though not necessarily to other religions) have been banished from public schools as potentially divisive, even when that has required the suppression of aspects of history, literature, and social studies. The insistence upon the 'neutrality' of the public school has been so insistent that many teachers even hesitate to discuss traditional virtues in teaching about sexual and other behavioral issues.5[4]The United States Supreme Court has decreed, however, that its judgments forbidding government support of religion do "not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history . . . (*School District of Abington Township v. Schempp and Murray v. Curlett*, 374 U.S. 203, 300 (1963)). This is a fine line, indeed, that prohibits teaching of religion but permits instruction about religion in public schools.

Non-state schools have suffered under two contradictory perceptions. In the nineteenth century and for much of the twentieth, Catholic, Lutheran, and other schools – many of which instructed in languages other than English – were established primarily by the churches of immigrants, and were accused of teaching 'un-American' values and retarding the assimilation of their pupils.[5] Another smaller but highly prestigious group of 'independent' schools were considered elite refuges for families unwilling to mix with the common people in the common public school.

Fear of immigrant separatism led to provisions in many state constitutions forbidding the granting of public funds for schools not operated by government even as other jurisdictions sought to prevent such schools altogether or to subject them to harassing oversight. It was after the Civil War and the post-war focus on reconstruction – both of the devastated South and also of disrupted lives and families in the North – that what has usually been called 'Church and State' controversies became virulent in the United States. The Protestant majority, so recently at war over slavery and secession, united to insulate from the ordinary democratic process any efforts to obtain public funds for Catholic schools.

The courts have struck down barriers to operating nonpublic schools with a religious character but have, until recently, concurred in denying them direct public funding, instead preferring to provide aid such as reimbursement for transportation (*Everson v. Board of Education*, 330 U.S. 1 (1947) and eventually free transportation to and from schools, textbooks for secular instruction (*Board of Education of Central School District 1 v. Allen*, 392 U.S. 236 (1968)), instructional services for poor students (*Agostini v. Felton* (521 U.S. 203 (1997)), and, to a limited degree, vouchers (*Zelman v. Simmons-Harris*, 536 U.S.639 (2002)) under the legal construct known as the Child Benefit Theory pursuant to which the aid goes to students and/ or their parents rather than their religiously affiliated non-public schools.

Uniquely among the nations included in this study, then, in the United States public support for the nongovernment schools chosen by some parents has been generally defined as a legal rather than a policy question. In other words, legislators have frequently enacted laws providing public support for nonpublic schools only to have them struck down by the courts on state or federal constitutional grounds. Only within the last decade has a series of court decisions opened the way to vouchers or other forms of public funding for these schools, whether religious or secular.

Arguably an even more significant recent development has been the adoption, by two-thirds of the states, of laws under which groups of parents, teachers and others can obtain approval and full public funding to operate 'charter schools' (independent public schools) and–in all the states–of laws under which parents can choose to educate their children at home.

The structure of schooling

There is no single educational system in the United States. Instead, there are fifty separate state systems (along with those in the District of Columbia, Puerto Rico, and a handful of other jurisdictions such as Guam) which share much in common, though without the sort of formal coordination which exists in other federal systems like Germany or Switzerland. All states provide twelve years of elementary and secondary schooling (the dividing line between elementary, intermediate, and secondary schooling varies among local school systems). State governments set requirements for schools operated by approximately 14,000 local school systems, each of which has an elected or appointed board that sets policies and appoints a superintendent to manage the schools.

Of the more than 50 million school children in America, about 6 million are educated in private schools, either attending nonpublic elementary and secondary schools or being homeschooled. Private schools include about one fourth of the elementary and

secondary schools and approximately 11 percent of the elementary and secondary enrollment in the U.S.

The most recent major development, charter schools, are public schools operated by private, civil society groups, and thus neither fully public nor fully private in the conventional sense. A charter school is run by a board of directors, the composition of which is regulated by the charter proposed by the organizers and approved by the state (or, in some cases, another public agency). The board of directors is responsible for hiring and dismissing staff, budgeting, curriculum development, and the general operation of the school. The charter school is fully funded by the state and may not charge tuition to parents.

> Traditionally, Americans have defined a public school as any school run by the government, managed by a superintendent and school board, staffed by public employees, and operated within a public sector bureaucracy. . . . Now consider a different definition: a public school is any school that is open to the public, paid for by the public, and accountable to the public for its results.[6]

Since the enactment of charter school legislation in Minnesota in 1991, 42 states and the District of Columbia have adopted charter laws with bipartisan political support. The longstanding dichotomy of public and private schooling has thus been transcended by a new organizational form with a new and still-developing legal status. The fact that some charter school boards have contracted with for- profit school management firms to operate their schools adds a further – and controversial – element to the situation.

There are a number of recently founded school management firms, of which the best-known is Edison, which currently manage hundreds of district and charter public schools. Low performing urban school districts are increasingly turning to external management to manage schools under contracts in an effort to improve efficiency, though this is strongly opposed by the teacher unions, which have more influence with politically-elected boards.

One of the most interesting developments in the organization of American schooling is the concept of school districts "managing portfolios" of semi- autonomous schools, perhaps including charter schools, with the central office supporting rather than administering the educational activities. The Center for Reinventing Public Education at the University of Washington manages a "portfolio district network" which includes New York City, Los Angeles, Washington, DC, Baltimore, and the Recovery School District established in Louisiana after Hurricane Katrina. "New York, with 1 million students and 1,700 schools, manages its diverse portfolio of schools by setting up networks of schools linked by similar educational philosophies but not necessarily geography. The networks provide some central-management

activities and are compared yearly for performance and principal satisfaction. Schools are free to switch networks yearly as they choose."[7]

The legal framework

The federal Constitution, adopted in 1789, makes no mention of education. Further, the Tenth Amendment, enacted in 1791 as part of the Bill of Rights, specifies that all powers not explicitly granted to the national government are reserved to the states. Of course, by its absence, education is key among the rights reserved to the states. In fact, in its only case on school finance, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973)) the United States Supreme Court declared that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." Accordingly, public education is financed and controlled primarily by state and local governments acting in concert.

The Bill of Rights and later amendments to the federal Constitution, while not mentioning education, have had the effect in recent decades of giving the national government, and especially the federal courts, a major role in state and local policy and practices as long as a party can demonstrate that governmental action, whether on the federal or state level impacts a constitutionally protected right such as equal protection under the law. In fact, it was equal protection that afforded the Supreme Court the opportunity to act in *Brown v. Board of Education, Topeka* (347 U.S. 483 (1954)), the most important case involving education law in its history, which also served as a harbinger for major changes in American society well beyond schooling.

The First Amendment defines what has sometimes been referred to as the "first freedom" under the American system. Its first words are "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The United States Supreme Court has held repeatedly that this language forbidding a state 'establishment of religion' consequently forbids public funding by any level of government for nonpublic schools with a religious character. Various exceptions will be noted below. The First Amendment also protects freedom of speech and of the press, rights which the courts have protected with respect to students and teachers in public schools.

The Fourteenth Amendment, adopted after the Civil War and the emancipation of slaves, has affected schools in highly consequential ways. The requirement of "equal protection of the laws" has placed the major part of the national burden of overcoming the effects of racial injustice on public schools not only through equal treatment of African-American (and, subsequently, Hispanic) pupils, but also

through various affirmative efforts to remedy the effects of racially based injustices that in some cases occurred generations ago. Thus, for example, if it can be shown that government policies in any community at some time in the past had the effect of causing residential segregation on the basis of race, a federal court might order that school attendance areas be redrawn in such a way as to overcome the segregatory effects of continuing residential patterns. Independent schools are not affected by such remedial requirements, though they are forbidden, by both federal and state (and, sometimes, local) law from discriminating against children or teachers, in admission, employment, or other respects, on the basis of race.

The Fourteenth Amendment has also been interpreted, by the United States Supreme Court in 1925, to guarantee as a protected "liberty" the right to choose a private education. Confronted with an Oregon statute mandating that all children attend government operated public schools, the Supreme Court ruled the statute unconstitutional, insisting that the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510).

The Fourteenth Amendment also created a requirement of "due process" in the decisions made by government, including public schools. This requirement, often reinforced by state laws, affects how public schools handle pupil discipline and staff evaluation.

A considerable body of federal legislation affects public schools – and, to a lesser extent, private schools – which protect the educational interests of pupils with special needs as well as the right of pupils not to be discriminated against on the basis of race, sex, or national origin, including Title IV of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Equal Opportunities Act of 1974. For a recent summary of how these apply to charter schools, and the No Child left behind Act. Federal legislation and regulations also govern the provision of funding for specific purposes supported by the federal government, amounting to about 6 percent of the total expenditure of and for schools.

The fifty states (and the District of Columbia, Puerto Rico, and a handful of other jurisdictions such as Guam) bear the constitutional responsibility for education. Each state has a constitution which defines its responsibility for education. That of Massachusetts, the oldest (1780) written constitution still in effect, was drafted by John Adams, later the second president. It provides that

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country [that is, Massachusetts], and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them . . . to encourage private societies and public institutions . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections, and generous sentiments among the people (*Constitution of Massachusetts*, Part the Second, Chapter V, Section II, "The Encouragement of Literature, etc.").

It is the states that adopt detailed legislation and regulations and, in some cases, curriculum guidelines and outcome standards for schools. These vary considerably, and in some cases such as California are extremely detailed.

At present, forty-two states plus the District of Columbia and Puerto Rico have adopted laws permitting the creation of charter schools. Charter schools, which are public schools of choice, are typically operated as not-for-profit institutions by private groups either independently or occasionally in conjunction with public institutions such as universities, continue to survive challenges to their constitutionality. These laws vary considerably, but have in common that an approved charter school may not discriminate on racial or other proscribed grounds in the admission of pupils and must meet educational outcome standards that–characteristically–those proposing the school and the approving agency have negotiated during the approval process.

Freedom to establish non-state schools

The right to establish non-state schools is guaranteed by the national *Constitution*, as applied by the Supreme Court in *Pierce v Society of Sisters*. Even so, it is the duty of individual states to establish the conditions under which nonpublic schools may operate, and each state has its own approach to control of nonpublic schools; and in some, such as Nebraska, the private schools are very strictly regulated. In others, such as Florida, there is very little or no regulation of private schools; while some, such as Kansas, give the private schools the option of being regulated by the state or operating independent of state control.[8]

In most states, the primary oversight over non-state schools is exercised by local public school authorities, which are responsible for ensuring that mandatory school

attendance laws are complied with. This obligation can be met by attendance at a public school, a school generally equivalent to the local public schools, or by home schooling similarly equivalent to local public schools. This is a free-floating criterion, given the enormous range in quality and resources of public schools, and leads commonly to situations in which public school staff are sitting in judgment upon nonpublic schools which, at least in times of declining enrolments, are their competitors.

In most cases, it is important to add, approval of nonpublic schools occurs routinely and without difficulties on either side. The unproblematic character of much of this oversight has led some school choice advocates to propose it be adopted as the model of accountability for nonpublic schools that receive vouchers. States, they argue, should be prevented from "enlarging controls upon curriculum, facilities, and school employment policies beyond the modest regulations that have traditionally applied to private schools."[9]

Public charter schools are a new phenomenon – the first were approved, in Minnesota, in 1990 – that are not part of local public school systems but are sponsored and controlled by independent, self-selected boards and yet are part of the public education system; thus, these charter schools blur the distinction between 'public' and 'private' schools. In the states with "strong" charter school laws, the awarding of a charter to operate and be funded as part of the public education system is not dependent upon the approval of local authorities. Charters are awarded directly by the state and perhaps also by other entities such as public universities. In some states, depending on the enabling legislation, approval of the local authorities must be obtained, although sometimes there is a state-level appeals process from an unfavorable decision.

Private schools may become charter schools and consequently receive public funding in Arizona, for example, while in other states like Massachusetts only new startups and existing public schools may become charter schools. The process of obtaining a charter requires the proposers to spell out in detail the school's distinctive mission, how the school will operate, what standards will be used to judge its success.

The establishment of multiple sponsoring authorities stands out as one of the most important factors in advancing charter schools. In 20002001, 57 percent of charter schools operating were approved by an entity other than the local school board. States with multiple sponsoring authorities or strong appeals process are home to 80.8 percent of the nation's charter schools.

By 2012, there were 42 states with charter school laws. The National Center for Education Statistics reports that "[f]rom 1999–2000 to 2009–10, the number of students enrolled in public charter schools more than quadrupled from 0.3 million to

1.6 million students. During this period, the percentage of all public schools that were public charter schools increased from 2 to 5 percent, comprising 5,000 schools in 2009–10."[10]

Homeschooling

In 1975, home schooling was illegal in most of the United States; at present, however, in all fifty states parents may educate their children at home without sending them to either a public or a nonpublic school; 36 of the states adopted such legislation between 1982 and 1993; Michigan was the last state to authorize home schooling, in 1995.[11]

Not that there is universal agreement in the United States that this practice should be permitted. The National Education Association (NEA), the larger of the two national teacher unions, "has voted to abolish home education every year since 1988 . . [stating that] 'home schooling programs cannot provide the student with a comprehensive education experience. . . . Instruction should be by persons who are licensed by the appropriate state education licensure agency, and a curriculum approved by the state department of education should be used."[12] In other words, parents educating their children should be required to be certified teachers.

The most recent study by the National Center for Education Statistics reports that

> In 2007, the number of homeschooled students was about 1.5 million, an increase from 850,000 in 1999 and 1.1 million in 2003. The percentage of the school-age population that was homeschooled increased from 1.7 percent in 1999 to 2.9 percent in 2007. The increase in the percentage of homeschooled students from 1999 to 2007 represents a 74 percent relative increase over the 8year period and a 36 percent relative increase since 2003. In 2007, the majority of homeschooled students received all of their education at home (84 percent), but some attended school up to 25 hours per week. Eleven percent of homeschooled students were enrolled in school less than 9 hours per week, and 5 percent were enrolled between 9 and 25 hours per week.
>
> More White students were homeschooled than Black or Hispanic students or students from other racial/ethnic groups, and White students constituted the majority of homeschooled students (77 percent). White students (3.9 percent) had a higher homeschooling rate than Blacks (0.8 percent) and Hispanics (1.5 percent), but were not measurably different from students from other racial/ethnic groups (3.4 percent). Students in two-parent households made up 89 percent of the homeschooled population, and those in two-parent households

> with one parent in the labor force made up 54 percent of the homeschooled population. The latter group of students had a higher homeschooling rate than their peers: 7 percent, compared with 1 to 2 percent of students in other family circumstances. In 2007, students in households earning between Parents give many different reasons for homeschooling their children. In 2007, the most common reason parents gave as the most important was a desire to provide religious or moral instruction (36 percent of students). This reason was followed by a concern about the school environment (such as safety, drugs, or negative peer pressure) (21 percent), dissatisfaction with academic instruction (17 percent), and "other reasons" including family time, finances, travel, and distance (14 percent). Parents of about 7 percent of homeschooled students cited the desire to provide their child with a nontraditional approach to education as the most important reason for homeschooling, and the parents of another 6 percent of students cited a child's health problems or special needs.[13]

Opponents concede that, at least as assessed by standardized tests, the academic outcomes of homeschooled children are at least equivalent to those of the average of pupils in public schools. Concerns are expressed about social isolation, and anecdotal evidence suggests that many homeschooling parents share this concern and involve their children in a variety of activities outside the home. In many school districts, homeschooled children are allowed to participate in school activities such as sports, clubs, and laboratory based classes, while in others they are not. The NEA's position is that "homeschooled children should not participate in any extracurricular activities in the public schools;" presumably the teachers' union is seeking to discourage homeschooling by marginalizing it.

A survey conducted by the federal government's National Center for Education Statistics in 1996 found that homeschooling families and families with children in private schools were more likely to be active in civic affairs than were public school parents. "Far from being privatized and isolated," an analysis concluded, "home schooling families are typically very well networked and quite civically active."[14]

Each state regulates school attendance and home schooling as it chooses. A few examples follow. In Massachusetts, for example, approval by local public school officials is required. The expectation is that 900 hours a year of instruction will be provided at the elementary level and 990 hours at the secondary, in reading, writing, English language and grammar, geography, arithmetic, drawing, music, history, and *Constitution* of the United States, the duties of citizenship, health, physical education, and good behavior. The parent providing the schooling is not required to have any particular qualifications.

New York State requires that home schooling include, at appropriate grade levels, instruction in "patriotism and citizenship, substance abuse, traffic safety, fire safety;

mathematics, reading, spelling, writing, English, geography, science, health, music, visual arts, and physical education; Grades 7-8:English, history and geography, science, physical education, health, practical arts, and library skills; United States and New York history and constitutions; participation in government, and economics." The instructing parent must be "competent," and must file, with local officials, quarterly reports listing the number of hours of instruction, description of material covered in each subject, and a grade or narrative evaluation in each subject, and also file an annual assessment based. In grades 4 and above, upon a standardized test or a written narrative evaluation prepared by a certified teacher, a home instruction peer review panel, or another person chosen by the parent with the consent of local officials.

California requires that the instructional program provided at home be the same as that of the public schools and in the English language. The parent must be "capable of teaching," and must provide instruction 175 days per year, 3 hours per day. No testing is required.

In South Carolina requires more home instruction, 180 days per year, 4 hours per day, in a range of subjects. The homeschooling parent must possess a secondary school diploma or the equivalent, and must maintain evidence of regular instruction including a record of subjects taught, activities in which the student and parent engage, a portfolio of the child's work, and record of academic evaluations, with a semiannual progress report. Homeschooled children must participate in the annual statewide testing program.[15]

Regulation is a sore point with home schoolers, and legal challenges are commonly brought against efforts by local school authorities to oversee home education which are perceived as intrusive.

The most recent development in this area is so-called "cyber schools," state funded public schools that offer full-time instruction on-line, and now function in thirty states and serve about 250,000 pupils. As might be expected, these enterprises have proved highly controversial, being opposed by the teacher unions and also by local school districts which, under state charter school laws, must pay for the participation of their pupils.[16] Thus, while districts have generally no financial obligations toward families who choose to homeschool, the situation changes if those families sign up for an on-line charter school.

These "virtual schools" also serve pupils who are attending regular schools, mostly at the secondary level, to offer courses that the local school does not provide or to do so in a different mode that suits the pupil's needs. It is estimated that in 2009-2010 there were 1,816,400 enrollments in such distance-education courses by pupils attending K-12 schools.[17]

Hundreds of books and websites offer guidance for homeschooling parents and it is possible to sign on with a variety of services (including the "cyber charter schools") which will provide curriculum, assessment, and eventual diplomas for the child educated at home. An entrant to what is becoming a crowded field of for profit education providers, for example, announced that "Led by Dr. William J. Bennett the former U. S. Secretary of Education), we've developed a world class program providing everything you and your child need for a high quality education."[18]

School choice not limited by family income

The state control of schooling makes it difficult to generalize about parental choice of schools. As a pioneering effort to establish indicators comparing the states pointed out,

> In some states, parents have a wide selection of charter schools from which to choose, while in other states there are none. In some states, parents have access to private school options via vouchers or tax subsidies, while in other states they do not. In some states, parents can home school their children with relatively few restrictions, while in others this option is heavily regulated. In some states, school districts are small enough that parents can easily move from one to another, while in other states school districts are as large as counties or even the entire state, making choosing a different district very difficult. In some states, parents can transfer their children to other public school districts without having to move, while in other states that option is unavailable or restricted.[19]

It has been estimated that 36 percent of schoolchildren attend public schools chosen by their parents through residential choice, 11 percent attend public schools under school choice policies (such as magnet schools), 1 percent attend charter schools, 2 percent are schooled at home, 10 percent attend private and parochial schools, and 41 percent attend public schools that their parents have not chosen.[20]

Government operated ('public') schools may not charge tuition, except in rare cases when a school system agrees to enroll a pupil who is not resident in the district; under some circumstances, the tuition is paid by the district of residence, in others by the family or, in the case of children who are 'wards of the state,' by a state agency.

The system of public funding of public schools is exceedingly complex and varied from state to state, the subject of perennial litigation, and unnecessary to discuss here. Even in the case of the recent phenomenon of 'charter schools,' legislators have generally not succeeded in rendering the financing arrangements clear and simple. In the words of a government report, "per-pupil base funding is only one component of an eclectic

financing system involving numerous state and federal revenue sources, and, frequently, negotiations between charter schools and school districts."[21]

Programs to promote parental choice among public schools developed in the late 1960s to improve racial integration of schools. Magnet schools are public schools with a particular theme or program, operating under assignment or admission policies designed to attract and maintain a racially-integrated enrollment on a voluntary basis.

> The idea of a magnet school was to attract and enroll students based on their *interest*, not ability level, in either a particular subject or career, such as science, art, or business, or learning through a different instructional approach, such as an open school. By attracting students with common educational interests, and diverse abilities and socioeconomic backgrounds, a magnet school would enroll a racially heterogeneous student body and provide a unique educational experience. Thus, for a school district, a magnet school program could improve education quality through diversity and advance education equity.[22]

Most magnet schools have been established to satisfy the requirements of state- ordered or court-ordered desegregation, and several states (notably Massachusetts, New York, Missouri) and the federal government have provided substantial supplemental funding to enhance the attractiveness of magnet school programs as a "painless" way to achieve a measure of desegregation.

By contrast with alternative schools with a distinctive pedagogy (though the dividing line is by no means clear in particular cases), magnet schools could be said to reflect the renewed emphasis upon the content of the curriculum that has begun to characterize American education in recent years, and some are highly selective on academic or other grounds.

Going a step beyond magnet schools, a few school systems have abolished individual school attendance districts and all pupils are assigned to schools on the basis of a process which requires parents to indicate preferences and seeks so far as possible to honor those choices. This method of assignment, often called "universal controlled choice," was developed in Cambridge, Massachusetts and has been emulated elsewhere as well.[23]

There are also a few desegregation-related programs under which transfers are permitted between local school districts, notably urban minority pupils transferring to suburban schools. The longest-established of these is the METCO program which began in Boston in 1968 and allows about 3,500 pupils to enroll, at state expense, in suburban schools; the largest is probably the St. Louis desegregation program.

Finally, state law may require that a pupil be permitted to enroll in an out-of-district public school at the expense of her district of residence when the latter does not offer some

program to which she is entitled: for example, a particular vocational course, bilingual program, or service for pupils with a disability. Legislation has been enacted in Arkansas (1989), Idaho (1990), Iowa (1989, 1992), Massachusetts (1991), Minnesota (1987, 1988), Nebraska (1989), Utah (1990) and Washington State (1990) permitting pupils to enroll in districts where they do not live, with varying arrangements for state and residential district assumption of costs.

With a few exceptions, federal, state, and local governments do not fund the educational mission of nonpublic schools, regardless of whether these schools have a religious character. There is, in some states, funding support for support services such as transportation and textbooks, and for some supplemental educational services. These are provided on the basis of the "child benefit theory," that the services are provided to the children without benefitting the schools (and thus providing unconstitutional government support to religion).

The Supreme Court has struck down various state programs for funding of nonpublic schools on the basis of their religious character. Yet, this has not in practice led (with exceptions to be noted below) to public funding targeted to nonreligious nonpublic schools for which religious ones are ineligible. Obviously, if there were such programs it would place great pressure on faith-based nonpublic schools to abandon or compromise their religious character. While this was in fact the effect of some earlier programs for funding nonpublic higher education, it might be prevented by a recent decision by the Supreme Court which spoke of "the requirement of viewpoint neutrality in the Government's provision of financial benefits" (*Rosenberger v. University of Virginia*, 515 U.S. 819, 834 (1995)). In fact, a number of state constitutions prohibit public funding of any school not under direct government control, whether religious or not.

The exceptions include programs in Maine and Vermont that allow communities with no secondary schools to tuition resident youth into either public schools of other communities or nonpublic schools. In the past, students could use these public funds to attend religious schools, but Maine limited the program to nonreligious schools in 1981, and Vermont did so in 1995. The other example of treating religious and nonreligious nonpublic schools differently is the initial stage of the voucher program in Wisconsin, adopted in 1990, when low-income pupils could receive state funds to attend nonreligious schools. The state legislature amended this in 1993, and as of now the great majority of the participants are in religious schools.

Many state constitutions include explicit provisions (as the federal Constitution does not) forbidding such funding, and some, like that of Massachusetts, go further to forbid public funding of schools which are not "publicly owned and under the exclusive control" of public officials (Article CIII). Similarly, the Michigan Constitution prohibits public appropriations directly or indirectly to aid or maintain nonpublic pre-elementary, elementary or secondary schools. (Art. 8, Sec. 2). The Supreme Court of Michigan has

interpreted this provision as prohibiting public payments to teachers in nonpublic schools

However, there are various exceptions in these provisions, as noted above. For example, many states provide bus transportation for pupils attending nonpublic schools, as a safety measure, and loan them textbooks. Publicly funded services are often provided to pupils with special educational needs attending nonpublic schools. The constitutional provision in Michigan, for example, has been held not to be a bar to nonpublic school student participation in federally subsidized programs designed to aid educationally deprived elementary and secondary school children, shared time programs, or special education services. State law, in fact, requires local school districts that provide transportation to their own pupils to also provide free transportation to nonpublic school students. Similar provisions are found in the laws of many states.

The large Federal program of aid to low-achieving pupils in schools with large proportions of low-income pupils includes a provision that those attending nonpublic schools must also be served. Two U. S. Supreme Court decisions in 1985 – *Aguilar v. Felton* and *Grand Rapids School District v. Ball* – were a devastating setback for the view that the state had a legitimate interest (as, for example, in France) in providing strictly secular services within the context of faith-based schooling. *Grand Rapids* struck down a program to provide supplementary courses such as arts and crafts, home economics, Spanish, gymnastics, chess, and model building during and after the regular school day in classrooms leased from nonpublic schools to pupils in those schools; the classrooms were leased by the school system, had to be free of religious symbols, and displayed a sign "public school classroom"! The Court decided that the teachers might be influenced by the "pervasively sectarian" atmosphere of the schools in which they worked (40 out of 41 participating nonpublic schools were faith-based) to indoctrinate the children in particular religious beliefs, that the program created the appearance of state endorsement of religion, and that the religious functions of the schools were subsidized indirectly through relieving them of other costs they might have borne.

Aguilar v. Felton struck down a federally-funded program under which employees of the New York City school system provided remedial instruction to poor children attending faith-based schools, on the basis that supervising those employees closely to ensure that they did not further the religious mission of the schools would necessarily create an "excessive entanglement" of public officials with religion (473 U.S. 373; 473 U.S. 402).

The Supreme Court appears to be returning to a more flexible stance in *Agostini v. Felton* (521 U.S. 203 (1997)). Obviating the earlier decision in *Aguilar* by dissolving the injunction that held the initial order in place, the *Agostini* majority declared "that the Court has abandoned [the] presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion." The Justices were satisfied that there was no impermissible state incentive to promote religious practice since the "the aid is allocated

on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." There may, therefore, be a certain softening in the Court's assumption that everything which a faith-oriented school does involves indoctrination.

In the three pioneering 'public voucher' programs (Milwaukee, Cleveland, Florida), the parent with a child accepted to a participating nonpublic school is issued a voucher for an amount equal to or less than the per-pupils cost in public schools. America's first publicly-funded school voucher program was enacted by the Wisconsin Legislature in April 1990, as the result of an initiative led by state Representative Annette "Polly" Williams, an African-American Democrat representing Milwaukee. A similar voucher program was enacted by the Ohio state legislature for low-income pupils living in Cleveland, a city, like Milwaukee, with a heavily black enrolment in a notably unsuccessful public school system.

Use of public funds to support tuition at schools with a religious character had been forbidden by a succession of decisions by federal and state courts, based on the First Amendment to the federal Constitution and by 'anti-aid' language incorporated into state constitutions, mostly as a result of nineteenth-century suspicions about the immigrant-dominated Catholic Church.[24] The Cleveland voucher program was upheld by the Supreme Court, however, in *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002), ruling that, under a voucher program, government places the decision in the hands of parents; the Chief Justice, writing for the majority, reasoned that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government, whose role ends with the disbursement of benefits."

Despite this green light at the federal level, the majority of states (which have the primary responsibility for schooling) continue to have constitutional provisions that are commonly interpreted to forbid even voucher programs. This is a rapidly-changing situation, and the reader is encouraged to consult the current information on vouchers and tuition tax credits available from the Education Commission of the States as well as from the Friedman Foundation for School Choice and other advocacy groups.[25] Moreover, insofar as *Zelman* is probably limited to the facts of Cleveland, a failing inner-city school that was operating under a desegregation order, vouchers may face an uphill battle in federal courts.[26]

School distinctiveness protected by law and policy

Few governments restrict the distinctiveness of independent schools. Even so, most states require local public school systems to ensure that the standard of education provided in

local independent schools is generally comparable to that in the public schools. Insofar as this is obviously, a vague standard, its enforcement has in some cases been successfully resisted (see below).

Government oversight of nonpublic schools occurs in a variety of ways even in the absence of public funding.

> The state can "reasonably [ ] regulate all schools, to inspect, supervise, and examine them, their teachers and pupils." (*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925)); mandate that the instructional language be English (*Meyer*); require private schools to provide an education that is "basic," "equivalent [to public education]" (*Yoder*. 406 U.S. at 213), or an "adequate education" (*Wolman v. Walter*, 433 U.S. 229, 240 (1977)) that meets "minimal educational standards" (*Yoder*, 406 U.S. at 239); regulate the "quality and nature" (*Board of Education v. Allen*. 392 U.S.236, 245 (1968)) of the curriculum consisting of "elemental skills" (*Wolman v. Essex*, 342 F. Supp. 399, 411, aff'd, 409 U.S. 808 (1972)) and "prescribed subjects of instruction" (*Allen*, 392 U.S. at 246 (1968)) "necessary for a productive and valuable life" (*Wolman* 342 F. Supp. at 411). The state may also set the standards requiring "minimum" hours of instruction (*Allen*, 392 U.S. at 246). Teachers may also be examined to ensure that they have received "specified training" (*Allen*, 392 U.S. at 246). The state may also inspect schools to ensure that they are in compliance with "fire inspections. Building and zoning regulations" (*Lemon v. Kurtzman*. 403 U.S. 602. 614 (1971)) and "safety standards" (*Wolman*).[27]

Despite this broad potential for interference, a state's excessive regulation may not eliminate the parent's right to direct the education of the child. In 1923, the Supreme Court struck down a statute from Nebraska that prohibited the teaching of German to elementary school age children. The Court determined that the law unreasonably interfered with the power of parents to control their children's education (*Meyer v. State of Nebraska*, 262 U.S. 390). Similarly, in 1927, the Supreme Court held that a statute from Hawaii unconstitutionally regulated the teachers, curricula, and textbooks of private language schools and placed control of the schools in public officers. "Enforcement," the Court said, "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful" (*Farrington v. Tokushige*, 273 U.S. 284, 298).

In 1976, the Supreme Court of Ohio resolved a constitutional challenge to the state's "minimum standards" governing nonpublic schools. The court determined that the standards were "so pervasive and all-encompassing that total compliance with each and every standard by a nonpublic school would effectively eradicate the distinction between public and nonpublic education, and thereby deprive these appellants of their traditional interest as parents to direct the upbringing and education of their children" (*Ohio v.*

Whisner, 351 N.E.2d 750, at 768).

The challenge to state legislators in regulating private schools, then, is to draft legislation that 1) respects the fundamental right of parents to direct the education of their children, 2) protects the state's interest in an informed citizenry but avoids interference with religious beliefs unless compelling interests are at issue, and then only in the least restrictive manner, and 3) avoids comprehensive regulation of private education that would deprive parents of any choice in education. Different states have found different solutions to this challenge. Typically, responsibility is placed upon local public school systems (of which there are more than 14,000 in the United States) to ensure that pupils resident within their boundaries are attending schools (or receiving instruction at home) equivalent in scope and quality to that provided by the public system.[28]

Distinctive character

The largest system of private schools in the United States is operated by the Roman Catholic Church, though this sector has become less dominant than it was in 1970, when about 70 percent of private schools were Catholic. In 2009-2010, 39.4 percent of private school pupils were in Catholic schools, and another 37.8 percent in other religious schools, with 22.8 percent in schools with no religious identity.[29] The number of pupils in evangelical Protestant grew rapidly in the 1970s and 1980s, though the growth has since leveled off, while Jewish and Muslim schools have also been growing.

Of the four million pupils attending private schools in 2009-2010, about 94,000 were in Jewish day schools, and 10,300 in Islamic schools.[30] More than 123,000 attended Montessori and 16,300 Waldorf schools. More than a million were in various flavors of Protestant schooling, mostly evangelical (that is, theologically conservative).

There are about 1,500 "independent schools," most of which belong to the National Association of Independent Schools (NAIS). This term has been appropriated by a subset of nonpublic schools that are in most cases selective and charge high tuitions.. Enrollment in NAIS schools, now more than 615,000, has been increasing. Median tuition in 2010-11 was $19,820 for day schools and $45,200 for boarding schools (including room and board). Most offer financial aid to some of their students: 26.7% on average with an average grant of $11,461. Of the total enrolment in NAIS schools, 26.7 percent are African-American, while 6.1 percent are Latino.[31]

Decisions about admitting pupils

Both federal and state law prohibit discrimination in admission to public schools

(including magnet schools and charter schools) on the basis of race, sex (an exception is made for single-sex charter schools), national origin, and other protected categories, and require that school systems accommodate handicapped pupils in "the least restrictive environment" consistent with their needs.[32] Exceptions have been ordered by the courts in many situations over recent decades to permit race to be used as a basis for assignment of pupils in the remedial phase of a school desegregation case, though this is becoming less common.

Concerns have been raised about whether public magnet schools and (more recently) charter schools 'cream' the pupils who are easiest to educate, or perhaps increase racial isolation in urban districts. Magnet schools are specifically designed to achieve a desirable racial balance through admitting pupils in some predetermined racial proportions.

Charter schools, while forbidden to discriminate on the basis of race, are not generally required to achieve any particular racial proportions. Nationwide, a higher proportion of charter school pupils compared with percent of pupils in regular public schools are from low income families, but there is considerable variation among the states. Thirty percent of the pupils in charter schools in 2009- 2010 were Black, and 26 percent Hispanic, reflecting the practice in many states of giving preference to charter applications proposing to serve pupils from low- income families. The most celebrated charter schools, such as the KIPP network of 125 schools in 20 states and the District of Columbia enrolling more than 39,000 students, has in fact been criticized by supporters of racial integration because the overall enrollment is 95 percent Black and Hispanic. Supporters counter that the same pupils would be attending heavily-minority district schools if it were not for KIPP, and would not be receiving such a challenging education.

Controversy has arisen over the failure of some to admit pupils with special educational needs and handicaps, on the grounds that they cannot provide appropriate services. Some charter school leaders insist that in fact they do serve such pupils, but resist labeling them as is the practice in district schools.

Some states allow charter schools to establish enrolment criteria which will enable them to pursue their distinctive educational mission

Controversy has also arisen over proposals to meet the needs of at-risk pupils through establishing, for example, a school serving only African-American boys, with an all-male staff, or a school serving only adolescent girls considered at risk of pregnancy and premature school-leaving. In a few cases such initiatives have been able to withstand legal challenge.[33]

Nonpublic schools may establish their own criteria for admitting pupils, though an

overt use of race as a criterion would be very likely to lead to a challenge from government regulators as well as loss of the school's tax-exempt status; such instances have grown extremely rare. Single-sex nonpublic schools are less and less common, though more to maintain enrolments than because of legal concerns. Schools with a distinctive religious character that do not receive public funding are free to use religious criteria in admissions decisions.[34]

Most Catholic schools, like other elementary schools in the private sector, do not have special requirements for admission other than proof of immunization, age, and residence. A third of non-public schools consider applicants' academic records during admission (table 2.3), but fewer of them use interviews (28 percent) or recommendations (9 percent) than do other private elementary schools. A significant proportion of the enrolment in Catholic education, and especially in urban schools, consists of non-Catholic pupils.

Of "other religious" (neither Catholic nor conservative Protestant) schools, 28 percent used religious affiliation as an admission criterion. Conservative Protestant schools took religious affiliation into account somewhat more than other private schools: 34 percent of elementary schools and 25 percent of other schools used it in admissions decisions

Among students at conservative Protestant schools, teachers perceived moderate and serious problems somewhat less frequently than in other private schools: only 5 percent saw physical conflicts among students and weapons as problems, compared to 10 percent in private schools overall; only 7 percent saw racial tension and poverty as problems, compared to 13 percent; and only 20 percent saw student apathy and lack of preparation as a problem, compared to 26 percent.

Academic requirements for graduation were similar to those in other private schools, 51 percent of secondary conservative Protestant schools required a year or more of foreign language instruction for graduation.

Decisions about staff

Public schools are generally required to employ only teachers and administrators who hold the certification issued by their state, or by another state under an arrangement of mutual recognition of qualifications. State requirements for initial certification commonly include completion of a university-based program of teacher or administrator preparation, followed by successful completion of a probationary period before permanent certification is given.

State charter school laws in some cases (for example, Arizona, Florida, Massachusetts, Texas) exempt these schools from the requirement to employ only state-certified staff, and in other cases (Colorado) a waiver of the requirement is common. Charter schools usually have more freedom to replace underperforming teachers than do other public schools, and the evidence is that they make use of this freedom.

> Most teachers in traditional public schools work under multiyear contracts negotiated between a [local government] school board and a teacher union. Matters are rather different in charter schools.... In only 4 percent of the surveyed schools did teachers work under multiyear contracts. In most schools (63 percent), teachers had one-year contracts. In a third of the schools, teachers had no contract at all.

As a result, "eighty percent [of the charter schools surveyed] indicated that they had terminated at least one teacher's employment for poor performance."[35]

Some states require private schools to employ state-certified teachers (a constant demand of the teacher unions), but most do not. In general, the elite independent schools prefer to hire teachers with a degree in the humanities or sciences rather than in education, while other nonpublic schools are often not able to afford to pay the higher salaries that state-certified teachers are able to obtain in public schools.

Schools with an explicitly religious character may make decisions about staff based upon religious considerations, though such decisions may be challenged if the school has not been consistent and explicit about the implications of its religious character for teacher behavior.[36] Congress, in adopting the *Civil Rights Act*'s Title VII forbidding employment discrimination, stipulated in § 702 that it "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." Further on in the same statute Congress provided that (1) it was not unlawful to use religion, sex, or national origin as a criterion when it was "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," and that (2) religion could be used as an employment criterion by an educational institution "owned, supported, controlled, or managed by a particular religion" or having a curriculum "directed toward the propagation of a particular religion." Obviously, Congress was concerned to make this "religious exemption" from nondiscrimination requirements broad and explicit; indeed, this exemption was strengthened in 1972 to

ensure that it would cover all of the activities of a religious organization, and not just those activities religious in themselves.

The Supreme Court ruled in 1979 that laws regulating labor management relations could not be enforced upon religious schools; several recent decisions have been based upon this precedent. There have been few cases involving teachers in religious schools, but it seems clear that the burden is upon the school to show that enforcement of labor laws would require "inquiry into the religious function of the school" (*National Labor Relations Board v. Catholic Bishop*, 440 U.S. 490).[37]

Most recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunities Commission* (132 S. Ct. 964 (2012) a unanimous Supreme Court reaffirmed the principle that religious educational institutions have the right to apply their own hiring rules under the ministerial exception. In upholding the authority of officials at a Lutheran elementary school in Michigan to dismiss a contract teacher who was also a commissioned minister in the church, the Court struck a blow for religious autonomy in the operation of K-12 religiously affiliated non-public schools as well as their counterparts in higher education.[38]

American jurisprudence makes a simplifying but misleading distinction between schools that are under the direct control of a religious organization and schools that, although autonomous, are based upon a religious ethos; the former may take religion into account in personnel decisions, the latter must demonstrate that they are pervasively and not just residually religious in character. This distinction is a way for the courts to avoid difficult decisions about the extent to which a set of beliefs is "sincerely held" by a school which is not controlled by a church, but it is blind to the fact that such a school may well be more authentically distinctive– and more distinctively religious – because its ethos and character have been worked through rather than borrowed from an institutional connection.

The leading case addressing this question involved nonpublic schools in Hawaii whose founding document a century ago required that it hire Protestant teachers and teach morality. The Court of Appeals concluded that the Kamehameha Schools were not sufficiently religious to be entitled to use religion as a basis for making hiring decisions. In enacting Title VII, the court held, "Congress did not anticipate schools that disavow any effort to instill particular religious beliefs in their students would come within the exemption" and that

> the curriculum of the Schools has little to do with propagating Protestantism, especially in grades 712. Seventh and eighth grade students study the nature of

> religious belief and the tenets of major faiths, and high school students take a one quarter course exploring the interrelationship of western religions and Hawaiian culture, but efforts to propagate Protestantism are not evident in this or any other coursework or in required activities of the Schools. Courses about religion and a general effort to teach good values do not constitute a curriculum that propagates religion, especially in view of the Schools' express disclaimer of any effort to convert their non-Protestant students. The Schools' publications demonstrate religion is more a part of the general tradition of the Schools than a part of their mission, and serves primarily as a means for advancing moral values in the context of a general education (*Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).[39]

A distinguished historian commented that this decision was of a piece with a general "assault on private institutions that want to preserve their religious traditions."

The issue of hiring is crucial to a college's or university's existence as a religious institution, even those that are relatively open. The University of Notre Dame, for instance, tries both to be open to wide diversity and to maintain a strong Catholic identity. As a Protestant at Notre Dame, I value that openness. But if the university had to drop all consideration of religion in its academic hiring, the overwhelming majority of professors and administrators would eventually have a profile of beliefs just like that of every other major university in the country. Notre Dame would cease to be a distinctly Catholic university, at least so far as its fundamental academic tasks were concerned. Religiously defined institutions are caught in a vise. For several decades, to qualify for Government aid, they have had to prove that their overall function and teaching are essentially secular. Now they have to prove that they are essentially religious if they are to maintain their religious identities in hiring. Those who value diversity and the rights of minorities should apply those principles in thinking about religiously based education. Diversity in American life should include room for diversity among institutions. If we are serious about multiculturalism, it does not make sense to deny a place for the institutions of religious subcultures. . . . Religious discrimination is so often mentioned in the same breath as racial and sexual discrimination that people come to think of them as equivalents. Yet the parallels take us only so far. Discrimination on the basis of religion can indeed be an immense evil. But if religion is central to the purpose of an institution, that organization cannot survive without the freedom to insure that at least some of its employees share its purposes. People who share a religious heritage should have the right to perpetuate that heritage through their educational institutions without penalty or prejudice. If

they do not, then it is their values and practices – their religious freedoms – that are being trampled.[40]

The Ninth Circuit subsequently upheld the right of the Kamehameha Schools to exist. The court explained that insofar as the policy giving rise to the existence of the schools was designed to remedy the imbalance in educational achievement between native Hawaiians and other ethnic groups, and educational opportunities were available for non-native Hawaiians, it was constitutionally acceptable (*Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006), *cert. dismissed*, 550 U.S. 931 (2007)).

According to a National Center for Education Statistics study, teachers in conservative Protestant schools – the fastest-growing sector – had fewer formal qualifications, such as degrees, certification, and experience, than private school teachers in general. About 14 percent of conservative Protestant school teachers did not hold a bachelor's degree [a 4year postsecondary qualification], and 20 percent had fewer than 3 years of teaching experience. 44 percent of conservative Protestant school teachers did not hold a state teaching certificate. In line with differences in qualifications, conservative Protestant school teachers also earned less, with over three-quarters receiving salaries of less than $20,000. Similarly, principals in conservative Protestant schools had lower education levels and fewer years of related experience than principals in private schools in general.

On the other hand, 54 percent of teachers in conservative Protestant schools were more satisfied with their salaries than were teachers in private schools overall (42 percent). Teachers in conservative Protestant schools also expressed greater levels of satisfaction in terms of class size, staff cooperation, and career choice, but they generally felt that they had less control over choice of textbooks and class content than private school teachers overall did.[41]

Accountability for school quality

Traditionally, it has been the responsibility of the boards for each of more than 14,000 local school districts – accountable to parents and other voters – to ensure that the education provided was of adequate quality. Competition among school districts was more often centered upon their sports teams than on academic achievement, though the latter was also a matter of interest for prospective residents of suburban communities and thus for real estate agents.

The primary means of comparison – and thus of accountability – was the scores obtained by graduating students on the college-entrance examinations known as the SAT and the ACT, each developed and administered by a private nonprofit organization rather than by government. Only New York State had its own examination at the end of secondary education, the so-called 'Regents Examination.'

Other commercially-available tests allowed school systems to assess the achievement of pupils in the lower grades. Typically these tests measure pupil achievement in relation to that of a sample of pupils nationwide, and not to fixed norms of knowledge and skill.

There is also an annual set of examinations, on a sampling basis, called the National Assessment of Educational Progress (NAEP), which is used to measure achievement in different states and school systems and changes over time. The NAEP is not designed to provide information about individual pupils.

It has only been over the last several decades that each state has developed a variety of forms of assessment of academic achievement, and in some cases examinations that must be passed in order to receive a secondary-school diploma from the local school system. These efforts have given rise to much controversy, both as to the content of the examinations and also to the very idea of high-stakes testing. Release of the results of state assessments have also increased demand for alternatives to underperforming public schools. Florida's voucher program allows pupils who attend such schools to transfer, at public expense, to private or other public schools, and the defenders of Cleveland's voucher program pointed out that the local public school system satisfied only three of the state's 27 performance criteria.

Apart from academic outcomes as measured by standardized tests, most states have few means of holding local school systems accountable for the quality of instruction provided. The idea of regular school inspection on behalf of state education authorities has never taken hold in the United States, though monitoring visits may be carried out in relation to particular program requirements or in response to complaints. The closest parallel to a system of inspection is the mutual accreditation of secondary schools by regional associations, based upon site visits every few years.

There are a variety of approaches to accountability for charter schools and voucher programs. In the Cleveland and Florida voucher programs and in the private voucher program supported by state tax deductions in Arizona, the 'market' of parental choice is the only form of outside accountability. Massachusetts, California, and other states set specific standards for charter schools, including test-score outcomes, graduation and attendance rates, and provision for pupils with special needs. Charter schools in Georgia are subject to a high-stakes accountability system.[42]

In general, accountability for results is of the essence of charter school programs.

> First, they empower state and/or local agencies . . . to enter into school- specific performance agreements with schools eligible to receive public funds and to withdraw the charters from schools that do not operate or perform as promised. Second, charter school laws allow parents and teachers to choose whether to be part of one school community or another.

More than a hundred charter schools nationwide have been closed by their authorizers for poor academic performance. Government agencies, however, "do not want to be forced to revoke a charter from a school in which absolute achievement levels are low but students are learning more than comparable students in conventional public schools."[43]

While the fundamental method of accountability for charter schools in most states is the results of standardized tests, several states also routinely monitor the schools by onsite visits. "Team members are carefully trained to avoid imposing their own personal tastes about the 'best' methods of instruction. Their job is to search for ways to help schools become as effective as possible given their [that is, the school's] goals and chosen methods."[44]

Private schools are in general subject to much less government oversight than are local public schools, though the states have the power to regulate them. *Pierce*, while protecting the right to operate and to choose nongovernment schools, also noted

> the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare (*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510).

Based on the "high responsibility for education of its citizens, [a state] may impose reasonable regulations for the control and duration of basic education" (*Wisconsin v. Yoder*, 406 U.S. 205, 213). The state's interest in an informed and self-sufficient citizenry capable of participating in a democratic society is generally cited to support the regulation of private schools.

The right to regulate is not without limitations, however. Nor may government, under the *Constitution*, seek to make nonpublic schools or social agencies its instruments in imposing particular viewpoints. While government has a general right to regulate in the public interest, there are limits, in any free society, upon how extensive this

regulation may be; "the regulatory scheme [for schools] must not be so comprehensive, intrusive, and detailed as to eliminate the possibility of private schools offering a program of instruction that is distinguishable in important respects from the public school program." As Van Geel points out, "the more the states attempt to regulate private schools the greater the likelihood they will stamp out the diversity these schools represent, and the promotion of diversity, the offering of alternative concepts and forms of education, is a central function served by private schools today."[45]

An example of how the courts have placed limits upon state regulation of nonpublic schools is provided by an interesting case in Kentucky.

> The Kentucky State Board for Elementary and Secondary Education attempted to exercise control over nonpublic schools by requiring their teachers to be [state] certified and that textbooks used be from a state approved list. These requirements were developed based on a legislative enactment directing private schools to teach the several branches of study that were required of the public schools. The State Supreme Court held in *Rudasill* [589 S.W. 2d 877 (Ky.179)] that these requirements were in violation of the state constitution which states ". . . nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." The textbook requirements would result in nonpublic schools being very similar to public schools. Parents with conscientious opposition to the public schools would have no place to send their children to comply with the compulsory education law.[46]

The principle of respecting the ways in which private schools differ from public schools is generally reflected in most, if not all, of the state education law codes. The various states take different approaches to regulating nonpublic schools, though none fund their core educational programs. Here are a few examples:

ALABAMA: State licensing is voluntary for schools operated by "a parochial, denominational, or religious organization, and/or as a ministry of a local church or group of churches on a nonprofit basis" or schools operated by "a community, educational organization, or group of parents, organized as a nonprofit educational corporation with the expectation of establishing a more favorable environment for those in attendance." Other private schools must hold a certificate issued by the state superintendent of education showing that the school conforms to the following requirements: (1) instruction is given by persons holding certificates issued by the state superintendent of education; (2) instruction is given in the several branches of study required to be taught in the public schools; (3) the English language is used in giving instruction; 4) a register of attendance is kept indicating every absence of each child from school for a half day or more. These requirements do not apply to church schools; for example, under the compulsory attendance law, children attending

private schools, but not church schools, are required to attend “the entire length of the school term,” and instruction at private schools, but not church schools, must be provided by persons holding certificates issued by the state superintendent of education.

CALIFORNIA: English is the basic language of instruction in all schools, public and private, in this state with a high proportion of immigrant children. The governing board of any private school may determine when and under what circumstances instruction may be given bilingually. Pupils proficient in English and fluent in a foreign language may be instructed in classes conducted in that foreign language. Students attending private schools are exempt from California’s compulsory attendance law if the schools offer instruction in the several branches of study required in the public schools of the state.

MASSACHUSETTS: Attendance at a private school satisfies the compulsory attendance requirement if the school is approved by the school committee. It is the responsibility of the local school committee to approve a private school when satisfied that the instruction equals that in the local public schools in thoroughness and efficiency and in the progress made by the pupils. A school committee may not withhold approval based on the school’s religious teaching. Since the quality of local school systems varies widely, there is no common standard applied to all private schools.

MICHIGAN: Unlike in Massachusetts, the state’s Superintendent of Public Instruction has direct supervisory power over all private, denominational and parochial schools, and the state requirements are much more explicit. English must be the basic language of instruction in any nonpublic school. This mandate does not prohibit religious instruction in a foreign language, classes to become conversant in a foreign language, or bilingual instruction to assist limited English- speaking students. Private schools are prohibited from discriminating against an individual based on a handicap that is unrelated to the individual’s ability to utilize and benefit from the school or the individual’s use of adaptive devices. In addition, private schools are prohibited from utilizing textbooks and learning materials which promote or foster physical or mental stereotypes. Teachers in a private, denominational or parochial school giving instruction to children below the age of 16 (when compulsory attendance ends) must hold a teaching certificate that would qualify them to teach in like grades of the public schools, though the Michigan Supreme Court ruled in 1993 that this provision is unconstitutional when applied to families whose religious convictions prohibit the use of certified instructors. Attendance at a state approved nonpublic school satisfies the compulsory attendance statute if the school teaches subjects comparable to those taught in the local public schools to children of corresponding age and grade. Nonpublic schools must provide regular instruction in the constitutions of the United States and Michigan, and the history and present form

of government of the United States, Michigan, and its political subdivisions. The State Board of Education is authorized to develop guidelines for expanding curriculum on the culture of ethnic, religious, and racial minority peoples, and the contributions of women. The guidelines must be made available to nonpublic schools, though these schools are not obligated to follow them. All of these provisions contrast with the general lack of regulation in states like Massachusetts.

TEXAS: In another state with a large Spanish speaking population, the state requires English to be the basic language of instruction in all schools. Bilingual instruction may be offered when necessary to insure efficiency in English so as not to be educationally disadvantaged. Students attending a private or parochial school are exempt from compulsory attendance at a public school if the school includes in its course a study of good citizenship.

Obviously, states vary greatly in the degree to which they place specific requirements upon nonpublic schools.

Teaching of values

Teachers in public schools tend to be nervous about addressing questions of values and character, because of the persistent attacks from secularizing organizations upon anything that could be perceived as religious expression in schools. For example, the decision of a school system in New England to adopt the goals of the Massachusetts *Constitution* led to a challenge on the grounds that this was an illegal introduction of religious themes in the schools.

In recent years, however, there has been an increasing openness, on the part of policymakers and educators, to addressing issues of character in schools. There is, for example, new interest in a longstanding requirement in Massachusetts law that teachers "shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded; and they shall endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above mentioned virtues to preserve and perfect a republican constitution and secure the blessings of liberty as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices" (*Massachusetts General Laws*, Chapter 71: Section 30).

In a survey of state education officials conducted by the Center for the Advancement of

Ethics and Character at Boston University, those from 36 states disagreed and only one agreed with the statement "Schools should *avoid* teaching values or influencing moral development. Character education is not a responsibility of the school." None disagreed and those from 36 states agreed that "There exists a set of *core* values/virtues upon which most Americans agree, regardless of race, religion, class, or culture, which can and should be taught in school." On the other hand, only 16 states have legislative requirements for character education, and in 14 states (which may include some of the same) it is included in curriculum standards or goals. In only four states is this included in requirements for teacher training. In short, the general support for the importance of teaching about values is not, in most cases, supported with concrete requirements.

Endnotes

[1] Stevens, 6

[2] Glenn 1988.

[3] Moe 2000, 87-88.

[4] Moran.

[5] Glenn 2012.

[6] Finn, Manno and Vanourek, 16.

[7] *Education Week*, July 18, 2012.

[8] Furst and Russo, 2.

[9] Coons and Sugarman 1992, 32.

[10] NCES 2012, Indicator 4.

[11] Information is available from the Home Schooling Legal Defense Association at http:// www.hslda.org/. For research results see http://www.nheri.org/.

[12] quoted by Somerville, 3.

[13] http://nces.ed.gov/programs/coe/indicator_hsc.asp

[14] Smith and Sikkink (1999), quoted by Somerville, 9.

[15] .http://homeschool.crosswalk.com/laws.

[16] Trotter, 21.

[17] http://www.inacol.org/press/docs/nacol_fast_facts.pdf

[18] http://www.k12.com.

[19] Greene.

[20] Henig and Sugarman.

[21] Nelson, Muir, and Drown

[22] Blank, 78.

[23] Glenn 1991.

[24] See Glenn 2012, which includes his expert testimony in a 2011 case challenging the anti-aid language of the 1876 Colorado *Constitution*.

[25] Education Commission of the States http://www.ecs.org/; Friedman Foundation http:// www.edchoice.org/

[26] Russo & Mawdsley. 2002.

[27] Randall, 75.

[28] See Glenn 2000, 4261.

[29] http://nces.ed.gov/programs/coe/tables/tablepri3.asp

[30] For an overview of Islamic schools in the United States, see Glenn 2010.

[31] http://www.nais.org/

[32] Office for Civil Rights, 5.

[33] Glenn 1995.

[34] see Glenn 2000, 193211.

[35] Podgursky & Ballou, 9, 13, 15

[36] See Furst and Russo, 306307.

[37] see Russo, 1990; *DeMarco v. Holy Cross High School*, 797 F.Supp. 1142 (1992).

[38] Russo & McGreal, 2012.

[39] case discussed in Glenn (2000), 92, 206.

[40] Marsden, 23.

[41] nces.ed.gov/pubs/ps/97459ch3.

[42] Gill, Timpane, Ross and Brewer, 41.

[43] Hill & others, 3, 37, 49.

[44] Hill and others, 52.

[45] Van Geel 1987, 23; 1976, 153.

[46] Furst and Russo, 116.

References

Note that this country profile is adapted from the 2004 edition, and the reader is encouraged to consult the latest developments. Excellent sources of information on schooling in the United States include the Education Commission of the States http://www.ecs.org/ for state laws and policies, which are too disparate and constantly-changing to be summarized adequately in this report, the National Center for Education Statistics http://nces.ed.gov/ for data and analyses on a wide range of topics, and *Education Week* http://www.edweek.org/ for reporting as well as links to many reports, both current and archival.

The discussion of state regulation of private schools draws heavily upon a report on all fifty states prepared by L. Patricia Williams, Special Assistant in the Office of Private Education, United States Department of Education. Links to many sources on the legal status of private schools can be found at http://sitemaker.umich.edu/kort.356/references.

Rolf Blank, "Education Effects of Magnet High Schools," in *Choice and Control in American Education, Volume 2: The Practice of Choice, Decentralization and School Restructuring*, London: Falmer Press, 1990.

John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control*, Berkeley: University of California Press, 1978.
--------, and , *Scholarships for Children*, Berkeley: Institute of Governmental Studies Press, 1992.

Chester E. Finn, Jr., Bruno V. Manno, and Gregg Vanourek, *Charter Schools in Action: Renewing Public Education*, Princeton University Press, 2000.

Lyndon G. Furst and Charles J. Russo, *The Legal Aspects of Nonpublic Schools*, Berrien Springs, MI: Andrews University, 1993.

Brian P. Gill, P. Michael Timpane, Karen E. Ross and Dominic J. Brewer, *Rhetoric versus Reality: What We Know and What We Need to Know About Vouchers and Charter Schools,* Santa Monica: Rand, 2001

Charles L. Glenn, *The Myth of the Common School*, Amherst: University of Massachusetts Press, 1988.

--------, "Controlled Choice in Massachusetts Public Schools," *The Public Interest* (103), April 1991.

--------, "Minority Schools on Purpose," in *Changing Populations, Changing Schools: 94th Yearbook of the National Society for the Study of Education*, Part II, edited by Erwin Flaxman and A. Harry Passow, Chicago: National Society for the Study of Education, 1995.

--------, *The Ambiguous Embrace: Government and Faithbased Schools and Social Agencies*, Princeton University Press, 2000.

--------, "Islamic Schools," in *Encyclopedia of Educational Reform and Dissent*, volume I, edited by Thomas Hunt, James Carper, Thomas Lasley, and C. Daniel Raisch, Sage Publications, 2010.

--------, *The American Model of State and School: An Historical Inquiry*, New York and London, Continuum, 2012.

Jay Greene, "The Education Freedom Index," <www.manhattaninstitute.org/ html/cr_14.htm>

Jeffrey R. Henig and Stephen D. Sugarman, "The Nature and Extent of School Choice," in *School Choice and Social Controversy*, edited by Stephen D. Sugarman and Frank E. Kemerer, Washington, DC: Brookings Institution, 1999.

Paul Hill and others, *A Study of Charter School Accountability*, Washington, DC: U.S. Department of Education, 2001.

George Marsden,, "Church, State and Campus," *The New York Times,* April 26, 1994.

Terry M. Moe, editor, *Private Vouchers*, Stanford, CA: Hoover Institution, 1995.
--------, *Schools, Vouchers, and the American Public*, Washington, DC: Brookings Institution, 2000.

Jeffrey P. Moran, *Teaching Sex : The Shaping of Adolescence in the 20th Century*, Cambridge: Harvard University Press, 2000.

National Alliance for Public Charter Schools, *Measuring Up to the Model: A Ranking of State Charter School Laws*, Third Edition, January 2012.

National Center for Education Statistics, *Homeschooling in the United States: 1999* (NCES 2001033), Washington, DC: U.S. Department of Education, 2001a.

--------, *Private School Universe Survey: 19992000* (NCES 2001330), Washington, DC: U.S. Department of Education, 2001b.

--------, *The Condition of Education 2012* (NCES 2012–045), Washington, DC, US Department of Education, 2012.

J. Howard Nelson, Edward Muir and Rachel Drown, *Venturesome Capital: State Charter School Finance Systems*, Washington, DC: U.S. Department of Education, 2000.

Office for Civil Rights, *Applying Federal Civil Rights Laws to Public Charter Schools*, Washington, DC: U.S. Department of Education, 2000.

Paul E. Peterson and David E. Campbell, "An Evaluation of the Children's Scholarship Fund," PEPG/0103, Cambridge: Kennedy School of Government, Harvard University, 2001.

Michael Podgursky and Dale Ballou, *Personnel Policy in Charter Schools*, Washington, DC: Thomas B. Fordham Foundation, 2001.

E. Vance Randall, *Private Schools and Public Power : a Case for Pluralism*, New York: Teachers College Press., 1994.

Charles J. Russo. "*NLRB v. Catholic Bishop of Chicago:* Collective Bargaining in Roman Catholic Secondary Schools Ten Years Later." *Education Law Reporter, Vol. 57, No. 4,* 11131121 (1990).

Charles J. Russo & Ralph D. Mawdsley. "Equal Educational Opportunities and Parental Choice: The Supreme Court Upholds the Cleveland Voucher Program." *Education Law Reporter, Vol. 169, No. 2,* 485-504, 2002.

Charles J. Russo & Paul E. McGreal, P.E. "Religious Freedom in American Catholic Higher Education." *Religion & Education*, *Vol. 39*, *No. 2*, 116-132 (2012).

Scott W. Somerville, "Legalizing Home Schooling in America," *Private School Monitor*, 21, 4 (Spring), 2001.

Mitchell L. Stevens, *Kingdom of Children: Culture and Controversy in the Homeschooling Movement*, Princeton University Press, 2001.

Andrew Trotter, "Cyber schools carving out charter niche," *Education Week*, October 24, 2001, 1, 21.

Tyll Van Geel, *Authority to Control the School Program*, Lexington, Massachusetts : D.C. Heath and Company, 1976.

--------, *The Courts and American Education Law*, Buffalo, NY: Prometheus Books, 1987.